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No. 800

Supreme Court of the United States

OCTOBER TERM, 1958

ADOLPH C. BERGER, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Eighth Circuit entered on February 2, 1959 (Appendix, p. 15a, R. 267).[1] This judgment affirmed a judgment of the United States District Court for the Eastern District of Missouri (R. 210).

OPINIONS BELOW

The District Court prepared no separate opinion, but entered a judgment (R. 210) which is unreported. The opinion of the Court of Appeals for the Eighth Circuit (Appendix, pp. 1a-15a, R. 249-66) is as yet unreported.

[1] Citations to pages 1 through 216 of the Record refer to pages in the record of trial which was before the Court of Appeals. Citations to pages 217 through 270 refer to the record of the proceedings in that court which are part of the record filed in this Court.

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit, affirming the judgment of the District Court, was entered on February 2, 1959 (Appendix, p. 15a, R. 267). A timely petition for rehearing was denied on February 26, 1959 (R. 268). The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED

This petition presents the following important questions of federal criminal procedure, upon which the decision below conflicts with decisions of this Court and decisions of the Court of Appeals for the Fifth Circuit:

Where the record shows one count of an indictment to be barred by the statute of limitations, may a court of appeals affirm a conviction on the basis of information obtained outside the record?

Where one count of an indictment is barred by the statute of limitations but concurrent sentences were imposed, may a conviction be sustained even though most of the evidence introduced related only to the barred count?

May a conviction be sustained where the only evidence connecting petitioner with the charged offense was the testimony of two accomplices who had been convicted of perjury with respect to prior testimony on the same subject matter?

STATUTES INVOLVED

The pertinent provisions of the laws of the United States are as follows (Internal Revenue Code of 1939, §§ 145(b), 3748(a), 53 Stat. 63, 461, as amended):

Internal Revenue Code of 1939, § 145(b)

"FAILURE TO COLLECT AND PAY OVER TAX, OR ATTEMPT TO DEFEAT OR EVADE TAX.—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution."

Internal Revenue Code of 1939, § 3748(a)

"CRIMINAL PROSECUTIONS.—No person shall be prosecuted, tried, or punished, for any of the various offenses arising under the internal revenue laws of the United States unless the indictment is found or the information instituted within three years next after the commission of the offense, except that the period of limitation shall be five years for offenses enumerated in section 4047(e) (relating to unlawful acts of revenue officers or agents) and except that the period of limitation shall be six years—

"(1) for offenses involving the defrauding or attempting to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner,

"(2) for the offense of willfully attempting in any manner to evade or defeat any tax or the payment thereof, and

"(3) for the offense of willfully aiding or assisting in, or procuring, counseling, or advising, the preparation or presentation under, or in connection with any matter arising under, the

internal revenue laws, of a false or fraudulent return, affidavit, claim, or document (whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document).

"For offenses arising under section 37 of the Criminal Code, March 4, 1909, 35 Stat. 1096 (U.S.C., Title 18, § 88), where the object of the conspiracy is to attempt in any manner to evade or defeat any tax or the payment thereof, the period of limitation shall also be six years. The time during which the person committing any of the offenses above mentioned is absent from the district wherein the same is committed shall not be taken as any part of the time limited by law for the commencement of such proceedings. Where a complaint is instituted before a commissioner of the United States within the period above limited, the time shall be extended until the discharge of the grand jury at its next session within the district."

STATEMENT

On December 18, 1953, petitioner was indicted for willful evasion of federal income taxes owed by a corporation engaged in an automobile sales and service business (R. 1). Petitioner was the president of the corporation and the owner of one-half of its stock (R. 14). The indictment contained two counts, one charging willful evasion by petitioner of corporate taxes for the fiscal year ending June 30, 1947, and the other charging such willful evasion for the fiscal year ending June 30, 1948 (R. 1, 2).

The alleged evasion grew out of the fact that during the two fiscal years in question automobiles were in short supply (R. 103, 137). Because of the difficulty in

obtaining automobiles, a number of purchasers acceded to the suggestions of two of the corporation's employee-salesmen and for certain automobiles paid, in addition to the invoice price which was paid by check made out to the corporation, an additional amount of cash to whichever of the two salesmen made the sale (R. 26, 113, 115, 118, 119, 121, 122, 124, 126, 127, 131).

Under questioning by agents of the Internal Revenue Service, both of these employee-salesmen, Carlisle Cooper and M. R. Crocker, denied under oath that they had asked for or received such additional cash payments (R. 97-99, 138, 139). For these denials, both Cooper and Crocker were indicted for perjury (R. 97, 139). Crocker entered a plea of guilty (R. 134). Cooper entered a plea of not guilty, and was tried and convicted of perjury, in spite of his denials on the witness stand, after some eleven witnesses testified that they had made such additional cash payments to him (R. 91, 97, 101). Both Cooper and Crocker served terms in prison for their perjury (R. 79, 134).

In this case, petitioner and Cooper were indicted for willful evasion of taxes owed by the corporation (R. 1, 2). Petitioner and Crocker were indicted for willful evasion of taxes owed by another corporation which had been formed in November 1946 to carry on part of the business of the corporation involved in this case (R. 139). The indictments as to Cooper and Crocker were dismissed three days before the trial of this case (R. 12, 139), and the petitioner was tried alone. At the trial below the Government produced twelve witnesses who testified that they had made cash payments to Cooper or Crocker in addition to the invoice price of the automobiles in question. The Government also called Cooper and Crocker as its witnesses. This time Cooper testified that he had received such pay-

ments, that he turned them over to petitioner in full, and that a 10 per cent commission thereon was returned to him by the petitioner (R. 82). Crocker, on the other hand, now testified that he paid 90 per cent of such payments over to the petitioner, retaining his 10 per cent commission (R. 141). Except for the testimony of Cooper and Crocker, the Government introduced no evidence to show that the petitioner received any of the amounts which Cooper and Crocker had received in cash from the purchasers of automobiles.

On cross-examination, it was shown that the indictments against both Cooper and Crocker had been dismissed three days before the trial of this cause (R. 97, 139). Both Cooper and Crocker testified that they had been made no promises in return for agreeing to testify as they did in this case (R. 111, 140), but Cooper stated that he was "hopeful o[illegible]me consideration" (R. 111). Both had signed waiver tolling the statute of limitations on assessment of their own income taxes for the fiscal years in question (Appendix, p. 6a, R. 256). Both testified to the fact that they had been convicted of perjury as a result of their prior statements about the matters in question (R. 97, 134).

After trial in which no other evidence was offered that petitioner, much less the corporation of which he was president, had received any part of the cash payments received by Cooper and Crocker, petitioner was found guilty and sentenced to a term of four years in the penitentiary (R. 210). On appeal, petitioner's conviction and sentence were affirmed (Appendix, p. 15a, R. 267).

REASONS FOR GRANTING THE WRIT

The scrim covering the questions presented is made up of the attempt by the Government to prove that petitioner received cash from Crocker and Cooper. That the Government's proof attempted no more is in itself fatal as the indictment charged willful evasion of income taxes owed by the corporation, not the evasion of taxes owed by petitioner personally. The frame of the indictment was necessitated not only by the fact that petitioner's income-tax returns corresponded with his net worth as determined in 1949, but also by the fact that the statute of limitations had run on any possible prosecution for understatement of petitioner's personal income in the crucial year. The only remaining vehicle for prosecution was the income of the corporation. With neither research nor proof both of the courts below assumed that if petitioner had received the illegal cash payments, the resulting income was corporate rather than personal. This assumption is without justification in the decided cases, in which payments received by a shareholder upon the sale of corporate property have been held to be corporate income only if all the shareholders consent to the taking. Thus, in the case of *Currier* v. *United States*, 166 F. 2d 346 (1st Cir. 1948), relied upon by the court below, the Court of Appeals for the First Circuit found it necessary to conclude that the shareholder in question was in effect the owner of all the corporate stock.[2] In the instant case,

[2] In Union Stock Farms v. Commissioner, No. 15783, 9th Cir., March 9, 1959 (59-1 U.S.T.C. ¶ 9317), decided after the decision below, it was held that corporate net income was increased even when *non-shareholder* employees, with the authorization of the president of a corporation, received and kept cash payments in addition to the invoice price of goods sold. While an argument can be made that corporate *gross* income should include such receipts, it is difficult to see how *net* income could be increased.

the Government did not attempt to prove that the owner of the remaining 50% of the shares had any inkling of the alleged transactions (R. 111, 142), or that the petitioner had any control over such remaining stock. The Government ignored this element of its case in spite of the fact that the Commissioner of Internal Revenue has acquiesced in a decision which held this element to be crucial. *Harry Sherin*, 13 T. C. 221 (1949), *acq.*, 1949-2 Cum. Bull. 1.

In *Sherin*, the petitioner corporation was a manufacturer of silk piece goods. Beginning in 1941 the corporation's non-shareholder sales agent, Biehl, began to accept cash payments in addition to the invoice price of the silk sold. This practice was followed with the consent of the corporation's president, one Berger, who was also a 50% shareholder. Ten per cent of the cash payments was retained by Biehl and 90% was turned over to Berger. Sherin, who was the corporation's secretary-treasurer and the owner of the other 50% of the shares, had no knowledge of this practice. On such facts the Tax Court held that the payments received by Berger did not constitute corporate income:

> "The corporation, as such, never authorized the illegal arrangements. It never received, directly

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Payments over invoice price can increase the corporate *net* income —which is of course the crucial figure in a tax-evasion case— only if such payments are retained in the corporate treasury or are treated as having been paid out as dividends, which are nondeductible. If a non-shareholder employee in such a case retains the cash payments he receives, the corporate net income is no more increased than is the net income of a night-club owner who permits his head waiter to negotiate with customers seeking ringside tables.

While the trial court below refused to give an instruction defining corporate income (R. 193), the Government did not proceed on the theory of the *Union Stock Farms* case.

or indirectly, any of the fruits of such transactions. Albeit Berger owned 50 per cent of the stock, Sherin owned an equal amount, and, on learning of Berger's action, he repudiated the illegal agreements. The corporate entity may not, in these premises, be disregarded. It has often been said that command over the income is a primary test of taxability. Here the corporation never had command over the illegal commissions. In accepting from Biehl 90 per cent of the excess payments, Berger acted for himself as an individual and not on behalf of Sherin, the other stockholder. Certainly it can not be said on the record here that he intended to act for the corporation, nor may any doctrine of estoppel be invoked to close the corporate mouth." 13 T. C. at 229.

Thus, the reasons for granting the writ, which are the conflicts created by and the completely erroneous nature of the decision below as to the criminal procedure that must be followed to obtain a valid conviction, also include the respectful suggestion that even in tax-evasion cases the proof must fit the charge in the indictment.

I

The Decision Below Affirming Petitioner's Conviction Despite the Fact That the Record Showed That the Statute of Limitations Had Run on One Count of the Indictment Is in Conflict With Two Decisions of the Court of Appeals for the Fifth Circuit.

On September 9, 1953, two days before the statute of limitations governing prosecution for evasion of corporate taxes for the fiscal year ended June 30, 1947, would have run, a complaint was allegedly filed with the United States Commissioner charging petitioner

with violation of Section 145(b) of the Internal Revenue Code of 1939 for the fiscal year in question (Appendix, p. 9a, R. 258, 259). The Government thereby attempted to take advantage of Section 3478(a) of the 1939 Code, which provides that the statute of limitations may be tolled by institution of a complaint before the United States Commissioner. Although the complaint was presented to the Commissioner on September 9, 1953, it was not transmitted to the Clerk of the District Court until December 10, 1953 (R. 221, 222), more than three months later, in spite of the injunction of Rule 5(c) of the Federal Rules of Criminal Procedure that such a complaint shall be transmitted "forthwith." The complaint was then misplaced and it was not entered in the docket in this case until April 15, 1958 (R. 222), that is, not until after petitioner had been tried and convicted.[3] Thus, when the case went to the jury the record showed that the statute had run when the indictment was found. The court below declared that this extraordinary irregularity did not vitiate the proceeding and that the statute of limitations had been effectively tolled. This holding is in direct conflict with the decisions of the Court of Appeals for the Fifth Circuit in *White* v.

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[3] The complaint is in the record filed with this Court only because it appears in a so-called supplemental record (R. 217-36) which the Government filed in the Court of Appeals. It does not appear in the record of the proceedings in the District Court and, since it had been misfiled in the Clerk's office, it could not readily have been located. Petitioner's motion in the Court of Appeals to strike portions of the supplemental record (R. 237) was never acted upon by that court.

The three-month delay of the Commissioner in transmitting the complaint to the District Court itself raises serious doubts as to whether the complaint was properly "instituted" before the statute had run.

United States, 216 F. 2d 1 (5th Cir. 1954), and *Flemister* v. *United States*, 260 F. 2d 513 (5th Cir. 1958), cases arising under the same statutory provisions as the instant case and presenting precisely the same issues.

In the *White* case the court had initially said that if the complaint had been filed in the record, judicial notice could be taken of it without the introduction of proof by the Government on this issue. On rehearing the court's attention was invited to the fact that the complaint was not part of the record in the case. As a result, the court reversed, holding that "it was necessary for the Government to prove by evidence properly introduced before the jury that a complaint was instituted before a Commissioner of the United States within the limitation period . . . ." 216 F. 2d at 8.

In the *Flemister* case the Government had made no attempt to show that the statute of limitations had been tolled by institution of a complaint. Moreover, it did not appear from the record that a complaint had been filed nor did it appear in the record that defendant had been notified of the complaint before indictment. The court, therefore, noted that at the time the case was submitted to the jury the Government had made no showing of facts sufficient to take the case from under the statute of limitations. The court thereupon held, as a matter of law, that the count of the indictment which the filing of the complaint had attempted to toll was barred by the statute of limitations. 260 F. 2d at 515-16, 518.

Although the court below was briefed on the fact that the indictment on its face showed that it had not been found within the statutory period, the Govern-

ment's failure even to attempt to prove the tolling of the statute was regarded as inconsequential. Before the petitioner could be convicted, however, the Government in the instant case was required to prove that the complaint had been instituted in sufficient time to toll the statute. This the Government made no attempt to do.

The court below further held that even if the statute had run, the conviction could be sustained on the ground that since the sentences for conviction on both counts of the indictment were equal in length and were to run concurrently, conviction under the second count was in and of itself sufficient to support affirmance of the conviction on both counts. It will be at once apparent that the court below erroneously relied on the rule that where a concurrent sentence does not exceed the maximum which lawfully may be imposed upon a single count, the judgment may be affirmed if the conviction on that count is valid. *Roviaro* v. *United States*, 353 U. S. 53, 63 n. 6; *Pinkerton* v. *United States*, 328 U. S. 640, 641-42 n. 1; *Hirabayashi* v. *United States*, 320 U. S. 81, 85. This rule, however, is not applicable in this case, as the rule is predicated on a valid conviction under the separate and remaining count. See *Roviaro* v. *United States*, 353 U. S. 53, 68.

In this case, the barring of the first count destroys the validity of the conviction upon the second count because nearly all of the evidence before the jury concerned the fiscal year ended June 30, 1947, the fiscal year with respect to which the statute had run. Crocker's testimony was relevant only as to the barred year (R. 134, 135). Witness Segelbohm, whose testimony the Government used in an attempt to support the two admitted and convicted perjurers although he

had not seen the petitioner receive any money (R. 24), testified only as to events in the barred year (R. 23, 24). The only testimony left is that of Cooper, also a convicted perjurer. Thus, the barring of the first count makes most of the evidence before the jury improper and means that the conviction must be based solely upon the uncorroborated testimony of a single convicted perjurer. In addition it can not be stressed too strongly that this witness was indicted as a joint defendant with petitioner, but the indictment against him was dismissed upon the motion of the Government three days before the trial of this case. Clearly, no person may be subjected to loss of liberty on so flimsy an evidentiary basis when it is apparent that the jury relied on evidence which the barring of the first count of the indictment rendered improper. See *Yates* v. *United States*, 354 U. S. 298, 311-12. In the *Flemister* case, which, as shown by the previous discussion, is so similar to this one, the court, after holding one count barred by the statute of limitations, noted that it might well be prejudicial to the defendant to have the jury hear evidence concerning the barred year. For this, as well as for other reasons, the court reversed and remanded the case despite the Government's reliance on the concurrent-sentence rule.

The holding below on this point is clearly erroneous and is in conflict with the decisions of the Court of Appeals for the Fifth Circuit. This Court should grant certiorari to resolve that conflict.

II

The Decision Below That the Uncorroborated Testimony of Convicted Perjurers Was Admissible and Sufficient to Sustain a Conviction Is in Conflict With Applicable Decisions of This Court and Presents an Important Question of Federal Criminal Procedure.

The Court of Appeals, relying on a decision of its own and a decision of the Court of Appeals for the Second Circuit,[4] held that there was no error in receiving the testimony of Cooper and Crocker even though each of these witnesses had committed perjury with respect to precisely the same subject matter. It is apparent that this holding conflicts with the decisions of this Court in *Communist Party* v. *Subversive Activities Control Board*, 351 U. S. 115, and *Mesarosh* v. *United States*, 352 U. S. 1.

In the *Communist Party* case, the Subversive Activities Control Board had ordered the Party to register as a "Communist-action" organization under the Internal Security Act of 1950. The Party appealed to the Court of Appeals for the District of Columbia. While the case was there pending, the Party moved for leave to adduce additional evidence on the ground that, subsequent to the Board's hearings, three of the witnesses upon whose testimony the Board relied had committed perjury. The Court of Appeals denied this motion and affirmed the order of the Board. This Court reversed:

> "If these witnesses in fact committed perjury in testifying in other cases on subject matter substantially like that of their testimony in the pres-

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[4] United States v. Reina, 242 F. 2d 302 (2d Cir. 1957); Dean v. United States, 246 F. 2d 335 (8th Cir. 1957).

ent proceedings, their testimony in this proceeding is inevitably discredited and the Board's determination must duly take this fact into account. . . .

". . . The purpose of this remand, as is its reason, is to make certain that the Board bases its findings upon untainted evidence. To that end it may hold a hearing to ascertain the truth of petitioner's allegations, and if the testimony of the three witnesses is discredited, it must not leave that testimony part of the record." 351 U. S. at 124, 125.

This decision did not leave it to the Board to conclude that the witnesses were telling the truth before the Board even though they had committed perjury in testifying about the same matters elsewhere. The trier of facts was not allowed the luxury of such guessing. This Court held as a matter of law that the testimony of these witnesses was discredited if they had previously perjured themselves in testifying about the same subject matter and that, if discredited, that testimony must not be left a part of the record.

The holding of the *Communist Party* case was reiterated less than six months later in *Mesarosh* v. *United States*, 352 U. S. 1. In that case, this Court ordered a new trial because the Government had relied in part upon the testimony of a "wholly discredited" witness. 352 U. S. at 9. This Court said that "the government of a strong and free nation does not need convictions based upon such testimony. It cannot afford to abide with them." 352 U. S. at 14.

In the instant case, it is a matter of record that the witnesses Cooper and Crocker had "committed perjury in testifying in other cases on subject matter substantially like that of their testimony in the present proceedings." Indeed, Cooper and Crocker stated that

they had done just that, and that they had been convicted for their false swearing. Under the holding of the *Communist Party* case, their testimony was "inevitably discredited" and the trial record tainted by its presence. This taint could not be removed merely by suggesting to the jurors that they take note of such falsehoods before returning a verdict based solely on the testimony in question. It was error to permit them to guess whether Cooper and Crocker had reformed. It was error to permit them to convict on the testimony of these witnesses because a conviction based on such evidence does not make the doing of justice "so manifest that only irrational or perverse claims of its disregard can be asserted." *Communist Party* v. *Subversive Activities Control Board*, 351 U. S. 115, 124.

By ignoring the *Communist Party* and *Mesarosh* cases, the court below did silently what some other federal courts have done explicitly.[5] It treated as meaningless this Court's rule that prosecutors in federal tribunals may not rely on the testimony of witnesses who have perjured themselves with respect to the same matters. In view of the misunderstanding of these two cases by the court below and some other fed-

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[5] United States v. Reina, 242 F. 2d 302 (2d Cir. 1957); United States v. Waldman, 160 F. Supp. 65 (D.N.J. 1958). Neither of these cases appears to have been concerned with witnesses who would be discredited as a matter of law under the *Communist Party* rule. Rather they dealt with witnesses who had apparently been shown only to have made inconsistent statements about the matters on which they testified. But each court indicated that the *Communist Party* and *Mesarosh* cases would not be applicable even if the witnesses demonstrably could not be relied upon to tell the truth as they saw it. These courts thus treated those cases as if this Court had remanded merely to permit counsel an opportunity for a more informed effort to impeach before the trier of fact.

eral courts, it is important that this Court give the necessary clarification.

In the event petitioner misconceives the rule in the *Communist Party* and *Mesarosh* cases, this Court has yet to determine the role of the perjurer in federal jurisprudence. Apart from these two cases, this Court has never considered whether the convicted perjurer is competent to testify in federal courts; whether, if competent in some cases, he is competent in all cases; whether, if competent in criminal cases, he is competent as a prosecution witness; whether, if generally competent as a prosecution witness, he is competent when clearly interested in the subject matter of his testimony; whether, if competent even in such a case, his uncorroborated testimony is sufficient to support a conviction.

In the federal courts, the abolition of the common-law rule disqualifying as witnesses those who had been convicted of infamous crimes came about through this Court's decision in *Rosen* v. *United States*, 245 U. S. 467. For the state courts, the abolition of that rule came about almost entirely through legislation. But, while the rule has been abolished in every state, ten of the forty-nine states have seen fit to make an exception.[6] That exception continues the common-law disqualification of convicted perjurers. If the Court did not consider the question in the *Communist Party* and *Mesarosh* cases, this Court has yet to decide

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[6] Ala. Code tit. 7, § 434 (1940); Fla. Stat. Ann. § 90.07 (1943); Md. Ann. Code art. 35, § 1 (1957); Miss. Code §§ 1692, 2315 (1956); N.D. Rev. Code § 31-0108 (1943); Pa. Stat. Ann. tit. 19, § 682 (1930), tit. 28, § 315 (1958); S.C. Code § 16-201 (1952); S.D. Code § 36.0105 (1939); Vt. Stat. tit. 41, § 8521 (1947); Vt. Stat. Ann. tit. 12, § 1608 (1959); Wash. Rev. Code §§ 5.60.040, 10.52.020 (1951).

whether either this exception to abolition of the common-law rule or the apprehensions behind it are to be given any recognition in the federal courts. This case raises that question. The question falls squarely within this Court's supervisory function with respect to criminal proceedings in federal courts, where certiorari jurisdiction is often exercised.

The reasons for limiting the common-law disqualification of infamous criminals are apparent. But it cannot be denied that removal of this disqualification has removed safeguards which were of considerable importance to defendants in criminal cases. And it cannot be denied that removal of the disqualification of convicted perjurers removes the most important of these safeguards, since conviction of perjury is peculiarly relevant to a determination of the reliability of a witness. Thus, one-fifth of the states have concluded that the difference between a conviction of perjury and a conviction of another crime is sufficient to justify the retention of the common-law disqualification of perjurers.

A strong argument can be made that the continued disqualification as witnesses of convicted perjurers is the most civilized rule. But even if the majority rule is followed and the blanket disqualification of perjurers rejected, we need not pretend that such witnesses are as reliable as others. Experience teaches that men who have little regard for the oath are very likely to testify falsely in cases such as this, in which they have a personal interest. This experience cannot be ignored. Moreover, it has long been a part of our jurisprudence that defendants in criminal cases are entitled to acquittal unless guilt is established by an extraordinary standard of proof. Even if perjurers are held compe-

tent as witnesses in civil cases, it does not follow that they are competent, particularly as prosecution witnesses, in criminal cases. And even if the perjurer's testimony should be held admissible in every case, it does not follow that a verdict of guilty can be based on such testimony *alone*.

To permit the petitioner's conviction to stand upon the uncorroborated testimony of Cooper and Crocker would be barbarism. Not only are these gentlemen convicted perjurers. They were also indicted as co-defendants and accomplices in the crime about which they testified, and the reward for their testimony was dismissal of the charges against them.[7] They were also clearly interested in establishing that the income from the cash payments in question did not belong to them, since their own tax liability for the years in question had not yet been settled.

It is now settled in the federal courts that the uncorroborated testimony of an accomplice is sufficient to support a conviction. *Caminetti* v. *United States*, 242 U. S. 470. The rule in nearly half the states is otherwise by statute, 7 Wigmore, Evidence, § 2056, p. 319 (3d ed. 1940), in recognition of the danger that an alleged accomplice to an alleged crime will testify falsely to place the blame on others in the hope of receiving lenient treatment for himself. Thus, even if Cooper and Crocker were accomplices and no more, one-half of the states would hold that a conviction could not be based on their uncorroborated testimony. This Court has made the contrary judgment. But it should not

[7] It is worthy of repetition that the charges were dismissed only three days before the trial of the petitioner, a circumstance which strongly suggests that pressure had been used by the prosecution to induce these witnesses to testify as they did.

carry that judgment over to a case in which the witnesses in question possess several characteristics that point strongly to unreliability. To permit a conviction to stand based on the uncorroborated testimony of men who have *both* motive and propensity to lie under oath would be to disregard all experience.

This Court, indeed, has already expressed its distaste for such a result. *Hammer* v. *United States*, 271 U. S. 620. That case decided that the "two witness" rule should be applied in cases of subornation of perjury. Mr. Justice Butler, speaking for a unanimous Court, did not hesitate to express his wonder that a conviction for subornation could have been obtained below upon the unsupported testimony of the alleged subornee:

> "Here the sole reliance of the Government is the unsupported testimony of one for whose character it cannot vouch—a dishonest man guilty of perjury on one occasion or the other. There is no reason why the testimony of such a one should be permitted to have greater weight than that of a witness not so discredited." 271 U. S. at 628.

In *Sykes* v. *United States*, 204 Fed. 909 (8th Cir. 1913), the Court of Appeals for the Eighth Circuit unanimously reversed a conviction based primarily on the testimony of one of the principals in the crime who was known to have sworn falsely about it. The opinion of that court could almost have been written with the facts of the instant case in mind:

> "[T]he uncorroborated testimony of the confessed perpetrator of a crime, contradicted under oath by herself, contradicted by other witnesses, and inspired by a hope of immunity from punishment, which in this case has since turned to glad fruition,

> that another was an instigator or a participator in the perpetration of her crime, is not only insufficient to establish his guilt beyond a reasonable doubt, but . . . it presents no substantial evidence of it." 204 Fed. at 913.

Prosecutors must not be permitted to obtain convictions on *any* evidence—no matter how shabby—which they consider relevant. There must be some point at which those trained in the law will say that a jury of laymen shall not convict solely on the basis of testimony whose source is demonstrably unreliable. Surely Judge Perry was correct when, in *United States* v. *Haderlein*, 118 F. Supp. 346 (N. D. Ill. 1953), he held that the uncorroborated testimony of an alleged co-conspirator who was also an admitted perjurer "does not constitute such evidence as would warrant a jury or a court finding the defendant guilty of an offense beyond a reasonable doubt." 118 F. Supp. at 348.

The court below in effect held that such a point does not exist. The instant case thus presents clearly the question whether the experience of the legal profession must be entirely ignored and prosecution officials given free rein to obtain convictions upon evidence from demonstrably unreliable sources. This is an important question in the administration of criminal justice, and it is a question worthy of the deliberations of this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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